16-320

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No ~~320.~~ 60

SILAS SEYMOUR, SILAS M. SEYMOUR, AND LESTER L. ROBINSON, SURVIVING PARTNERS OF S. SEYMOUR & COMPANY, PLAINTIFFS IN ERROR,

VS.

THE WESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 13, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 326.

SILAS SEYMOUR, SILAS M. SEYMOUR, AND LESTER L. ROBINSON, SURVIVING PARTNERS OF S. SEYMOUR & COMPANY, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA,
Eastern District of North Carolina, ss:

Pleas in the circuit court of the United States for the eastern district of North Carolina, held at the United States court-room in the city of Raleigh, in the district aforesaid, on the last Monday in November, A. D. 1877, and in the year of our Independence the 102nd.

SILAS SEYMOUR, SILAS M. SEYMOUR, AND Lester L. Robinson, surviving partners of the firm of S. Seymour & Company, plaintiffs,
against
THE WESTERN RAILROAD COMPANY.
} Action of covenant.

EASTERN DISTRICT OF NORTH CAROLINA, *to wit:*

Be it remembered that in the year of our Lord 1856, Silas Seymour, Silas M. Seymour, and Alvin C. Morton, and L. L. Robinson, by their attorneys, Patrick Winston and Henry W. Miller, sued and prosecuted out of the circuit court of the United States for the district of North Carolina, a writ of summons against The Western Railroad Company, in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA,
District of North Carolina:

Circuit court 4th circuit.

To the President of the United States of America to the marshal*l* of the North Carolina district, greeting:

You are hereby commanded to summon The Western Railroad Company, a corporation created by laws of North Carolina, citizen and resident of North Carolina (if to be found in your district), so that it be and appear before the judges of the circuit court of the United States, at the next court to be held for the district aforesaid, at Raleigh, on the last Monday in November next, 1856, then and there to answer unto Silas Seymour, Silas M. Seymour, and Alvin C. Morton, citizens and residents of the State of New York, and Lester L. Robinson, a citizen and resident of the State of California, copartners trading in the name and style of S. Seymour & Company, of a plea of a breach of covenant to their damage, two hundred and fifty thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. R. B. Taney, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the first Monday in June, 1856, and in the 81st year of Independence of the United States.

Issued day of 1856.

[SEAL.]

W. H. HAYWOOD, *Clk.*
[*ED. CANTWELL, *Clk.*]
[*H. E. BRYAN, *Clk.*]

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* In pencil.

1 UNITED STATES OF AMERICA,
Eastern District of North Carolina, ss:

Pleas in the circuit court of the United States for the eastern district of North Carolina, held at the United States court-room in the city of Raleigh, in the district aforesaid, on the last Monday in November, A. D. 1877, and in the year of our Independence the 102nd.

SILAS SEYMOUR, SILAS M. SEYMOUR, AND Lester L. Robinson, surviving partners of the firm of S. Seymour & Company, plaintiffs, *against* THE WESTERN RAILROAD COMPANY.	Action of covenant.

EASTERN DISTRICT OF NORTH CAROLINA, *to wit*:

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2 UNITED STATES OF AMERICA,
District of North Carolina:

Circuit court 4th circuit.

To the President of the United States of America to the marshal*l* of the North Carolina district, greeting:

You are hereby commanded to summon The Western Railroad Company, a corporation created by laws of North Carolina, citizen and resident of North Carolina (if to be found in your district), so that it be and appear before the judges of the circuit court of the United States, at the next court to be held for the district aforesaid, at Raleigh, on the last Monday in November next, 1856, then and there to answer unto Silas Seymour, Silas M. Seymour, and Alvin C. Morton, citizens and residents of the State of New York, and Lester L. Robinson, a citizen and resident of the State of California, copartners trading in the name and style of S. Seymour & Company, of a plea of a breach of covenant to their damage, two hundred and fifty thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. R. B. Taney, Chief Justice of the Supreme Court of the United States, at Raleigh, in said district, the first Monday in June, 1856, and in the 81st year of Independence of the United States.

Issued day of 1856.
[SEAL.]

W. H. HAYWOOD, *Clk.*
[*ED. CANTWELL, *Clk.*]
[*H. E. BRYAN, *Clk.*]

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* In pencil.

3 And the plaintiffs deposited in court the sum of five hundred dollars, in lieu of a prosecution bond.

And after the return of said writ of summons the plaintiffs, by their attorneys D. A. Barnes and Jno. W. Hinsdale, come and complain as follows:

4 UNITED STATES OF AMERICA,
District of North Carolina:

In the circuit court of the United States for the 4th circuit district of N. C., Nov. term, 1856.

The Western Railroad Company, a body politic and corporate, organized and created and existing under and by virtue of the laws of North Carolina, doing business in the said State of North Carolina and having its principal office within said State, and being a citizen and resident of the said State, was summoned to answer Silas Seymour, Silas M. Seymour, and Alvin C. Morton, citizens and residents of the State of New York, and Lester L. Robinson, a citizen and resident of the State of California, copartners, trading in the name and style of S. Seymour & Company, of a plea of a breach of covenant, &c.

1st COUNT.—And thereupon, the said plaintiffs, by D. A. Barnes & J. W. Hinsdale, their attorneys, complain for that whereas, heretofore, to wit, on the 27th day of August, A. D. 1855, at Fayetteville, in the county of Cumberland and State of North Carolina, by certain articles of agreement then and there made and concluded and agreed upon, between the said plaintiffs, of the one part and the said Western Railroad Company, the defendants, of the other part, 5 one part of which said articles of agreement sealed with the seal of the said defendant, the said plaintiffs now bring here into court, the date whereof is the day and year aforesaid, the said plaintiffs contracted, promised, and undertook with the said defendant, to construct and build an entire and substantial railroad with a single track and the necessary turnouts, from some point at or near the Cape Fear River, in the town of Fayetteville, North Carolina, to a point in the coal regions, on the easterly side of Deep River, in the county of Chatham, and State of North Carolina, said road not to exceed forty-three (43) miles in length, according to the rules and directions set forth at large in said articles of agreement, as by reference thereto will more fully appear, the said plaintiffs to furnish all the material and labor necessary for the construction of the said railroad; to commence work upon the said railroad on or before October 1st, 1855, and to complete the same on or before October 1st, 1857.

And the said defendant did thereby covenant, promise, and agree to and with the said plaintiffs, amongst other things, that the said defendant would well and truly pay to the said plaintiff for the building and construction of said railroad the sum of eighteen thousand two 6 hundred and fifty ($18,250) dollars per mile, and at the same rate for the necessary side tracks or turnouts, the payments to be made as follows: The sum of two hundred and fifty thousand ($250,000) dollars in good current bank notes of the North Carolina banks, the sum of eighty-four thousand and seven hundred dollars ($84,700) in the capital stock of said railroad company at its par value, the sum of three hundred thousand ($300,000) in the first mortgage bonds of the said railroad company at their par value, payable twenty (20) years

after date in the city of New York, bearing (7%) seven per cent. in-
terest, payable semi-annually, in the said city of New York the said
bonds to be convertible into the capital stock of the said railroad co.
at par value, at any time after two years from their date and within
one year of their maturity, and the balance of any payments that may
be due to the said plaintiffs by the said defendant to be paid in the
second mortgage bonds of the said railroad company, the same to bear
(7%) seven per cent. interest and payable in like manner and to be
convertible the same as the aforesaid first mortgage bonds. And it
being further agreed that if the said second mortgage bonds should be
endorsed by the State of North Carolina, they would be received by
the plaintiffs at their par value; but if these bonds should not be so
endorsed by the State of North Carolina, then the said defendant
7 to issue the *the* same in such manner as shall make them equal
to cash or their par value. And the said defendant further cove-
nanted, promised, and agreed with the said plaintiffs, by the said arti-
cles of agreement, that the said defendant would well and truly pay or
cause to be paid to the said plaintiffs as the work should progress—
upon monthly estimates, to be made by the chief engineer appointed
by the plaintiffs, or in his absence by his assistant engineer—within six
days from the filing of the same in the defendant's office in Fayetteville
aforesaid, such sums of money as might be due thereon for work done
and materials furnished by the said plaintiffs in the construction of the
said railroad, the said estimates to be made in accordance with a
schedule of prices fixed and established in said articles of agreement, a
copy of which schedule, marked Exhibit A, is filed herewith and made
a part hereof. And the said defendant covenanted, promised, and
agreed in said articles of agreement to make said payments in the
following manner, viz, Seventy per cent. (70%) of the amount due
by said estimates to be paid to said plaintiffs in cash, or current bank
bills of the State of North Carolina, twenty per cent. (20%) thereof,
in the said first-mortgage bonds of said railroad company.
8 the first payment in said bonds to be made when there should be so
much as ($20,000) twenty thousand dollars of said bonds due and
owing to said plaintiffs by the said defendant in this behalf, and the remain-
ing ten (10%) per cent. to be retained by the said defendant as security
for the faithful performance of the contract on the part of the plaintiffs,
and to be paid to them in the capital stock of said defendant within one
month after the completion of the said railroad as by the said articles
of agreement under the seal of the said defendants, and under the sig-
nature of the said plaintiff, now brought into court, relation being there-
unto had, will among other things more fully appear.

And although the said plaintiffs have well and truly performed and
fulfilled all and singular the covenants and agreements in the said arti-
cles of agreement mentioned on their part and behalf to be done and
performed, and did afterward, to wit, on the day and year aforesaid, at
and near the town of Fayetteville aforesaid, did, immediately after the
signing and sealing of the said articles of agreement, enter upon and
commence the construction of said railroad, and did procure and furnish
a large quantity of materials to be used in its construction, to
9 wit, (169,205) one hundred and sixty-nine thousand two hundred
and five feet board-measure of timber and lumber, and seven
hundred (700) pounds of iron spikes, and did expend upon said railroad
a large amount of labor in the chopping clearing of (11,960) eleven
thousand nine hundred and sixty square rods, grubbing eighteen hun-
dred and twenty (1,820) square rods, and in earth excavations eighty-

four thousand five hundred and seven (84,507) cubic yards. And that the plaintiffs appointed a chief engineer, who did make monthly estimates of work done and materials furnished in accordance with the schedule of prices mentioned in said articles of agreement, and did certify the same to the president of the said Western Railroad Company for the months of August and September, October, November, and December, 1855, and February, 1856, and that his principal assistant engineer did make monthly estimates of work done and materials furnished in accordance with said articles of agreement, in the absence of the chief engineer, and did certify the same to the president of the said company for the months of January, March, April, and May, 1856. All of which said certificates of estimates were monthly filed in the office of said company at the beginning of each month for the last prece*ed*ing month.
10 And that said work performed and materials furnished, according to said estimates, amounted in the aggregate to forty-two thousand two hundred and seventeen $\frac{64}{100}$ dollars.

And that according to said estimates, which were true and correct, the said defendants, by said articles of agreement, were bound within six days after the filing of the same to pay to the said plaintiffs the several amounts thereof as above stated, to wit, for the month of Febr'y, 1856, the sum of $8,330.88; for the month of March, 1856, the sum of $7,082.58; for the month of April, 1856, the sum of $7,328.71, and for the month of May, 1856, the sum of $4,423.45. That the said work and materials so furnished were in all respects in accordance with the said articles of agreement, and were worth the amounts specified.

And that the said plaintiffs have always been ready and willing to perform and complete the whole of said work in pursuance of said articles of agreement, of all which premises the said defendants had notice, to wit, at Fayetteville aforesaid. Yet the said plaintiffs in fact say that the said defendant, contriving and wrongfully intending to injure the said plaintiffs, did not nor would perform the said agreement nor
11 the said covenants and undertakings in the said articles of agreement contained, but thereby craftily and subt*i*ly deceived the said plaintiffs in this, to wit, that the said defendant did not nor would not advance the said sums of $833.88, $7,082.58, $7,328.71, and $4,423.75, due to the said plaintiffs in the months of March, April, *May*, and May, 1856, respectively, nor would the said defendant advance or pay to the said plaintiffs (70%) seventy per cent. thereof in cash, as provided in the said articles of agreement, but on the contrary thereof has hitherto wholly neglected and refused so to do, to wit, in the months of March, April, & May, 1856, in the town of Fayetteville, whereby and in consequence of which the said plaintiffs have lost the value of their said work and their said materials expended and furnished upon the said railroad.

And that the said defendant, further disregarding the said articles of agreement and his said covenants and undertaking, afterwards, to wit, in the months of February, March, & April, and on the 2d day of May, 1856, and on the 7th day of May, in Fayetteville aforesaid, did not nor would permit or suffer the said plaintiffs to proceed to complete the said road, and then and there would wholly hinder and prevent them
12 from so doing, and then and there wrongfully discharged the said plaintiffs from any further performance or completion of their said agreement, promise, and undertaking, whereby the said plaintiffs have lost the value of their work and materials expended upon the said railroad, and have lost and have been deprived of the profits and advan-

tages which they otherwise might and would have derived and acquired from the completion of the said work, to wit, at Fayetteville aforesaid.

And the plaintiff, in fact, say that the said defendant, although often requested to do so, hath not kept the said covenant as by the said defendant made as aforesaid, but has broken the same, and to keep the same with the said plaintiffs has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiffs of two hundred and fifty thousand dollars, and therefore they bring this suit, &c.

BARNES AND HINSDALE,
Plaintiffs' Att'ys.

13 EXHIBIT A.

It is further agreed between the parties hereto that the following schedule of price shall be issued by the chief engineer in making up the amounts of the monthly estimates for work done and material furnished, to wit:

Chopping & clearing, per sq. y'd	40 cts.
Grubbing " " " "	150 "
Earth excavations " " "	37 "
Rock " " " "	100 "
Timber plank in trestle-work, per thousand feet, b. m	$25 00
Timber & plank in culverts, per thousand feet, b. m	$25 00
Bridging for 100 feet span, p'r lineal foot	$35 00
" " 50 " " " " "	$25 00
" " 30 " " " " "	$15 00
Cross-ties delivered, per tie	30c.
Railroad spikes delivered, p'r pound	6c.
" iron " " ton	$65 00
Track laying, per mile	$500 00
Timber delivered, per 1,000 f't, b. m	$12 00

14 Then comes the defendant, The Western Railroad Company, by their attorneys, Wm. McL. McKay and James C. MacRae, and having appeared, plead as follows:

15 In the circuit court of the United States for the district of North Carolina, November term, 1871.

THE WESTERN RAILROAD COMPANY
ats.
SILAS SEYMOUR, SILAS M. SEYMOUR, ALVIN C. Morton, and Lester L. Robinson.

And the said Western Railroad Company, defendant in this suit, by its attorneys, Wm. McL. McKay and James C. McRae, comes and defends the wrong and injury, when, &c., and says that the said supposed articles of agreement is not the deed of the defendants; and of this the said defendant puts itself upon the country.

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against this defendant, because this defendant says it is not true as alleged, that this defendant, at November term, 1856, was summoned

to answer Silas Seymour, Silas M. Seymour, Alvin C. Morton,
16 citizens and residents of the State of New York, and Lester L.
Robinson, a citizen and resident of the State of California, copartners, &c.; and of this it puts itself upon the country.

And for a further plea in this behalf as to the supposed covenant or agreement, this defendant, by leave, &c., says it is not true as alleged that, on the 27th day of August, A. D. 1855, at Fayetteville, in the county of Cumberland and State of North Carolina, this defendant made and concluded the supposed covenant and agreement, or any other covenant and agreement on the day aforesaid or any other day, at any other time or at any other place with the plaintiffs, Silas Seymour, Silas M. Seymour, and Alvin C. Morton, citizens and residents of the State of New York, and Lester L. Robinson, a citizen of the State of California; and of this the said defendant puts itself upon the country.

And for a further plea in this behalf this defendant, by leave, &c., says that the plaintiffs ought not to have and maintain their aforesaid action thereof against this defendant, because this defendant says that the said plaintiffs did not well and truly perform all and singular the
covenants and agreements in the said supposed articles of agreement
17 mentioned on their part and behalf to be done and performed in the manner set forth in said supposed articles of
agreement; and of this it puts itself upon the country.

And for a further plea in this behalf, this defendant, by leave, &c., says that the plaintiffs ought not to have and maintain their aforesaid action against this defendant, because he says that the work was not done in accordance with the terms of the supposed contract. That according to the report of the superintending engineer of the company, appointed according to the provisions of the supposed covenants and agreement, and whose duty it was to see that the work was done in accordance with the terms of the supposed contract to consult and advise with the chief engineer upon the location of the line and the establishment of the grade, and to give his approval to all plans for bridges and other structures which may be required; have access to all field-notes maps, plans, diagrams, &c., in the office of the chief engineer, and whenever he shall think any abuses were practiced, examine and investigate the same and report the same to the president of the company. Certain abuses were practiced by the said plaintiffs in the execution of
the work on their part to be done and performed; and of this the
18 defendant puts itself upon the country.

And for a further plea in this behalf the said defendant, by leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against this defendant, because this defendant says that he was not bound within six days after the filing of the estimates, as set forth in the plaintiffs' declaration, to pay the plaintiffs the several amounts therein stated; that said estimates were not true and correct, and that the said work and materials alleged to have been done and furnished, were not in accordance with said supposed articles of agreement, and were not worth the amounts specified and set forth in said declaration; and of this the said defendant puts itself upon the country.

7. And for a further plea in this behalf the said defendant, by leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against this defendant, because this defendant says, that in the month of May, 1856, the said plaintiffs gave notice to the defendant that unless certain charges of money made against the

defendant by the said plaintiffs were paid by the defendant, they, the said plaintiffs would not proceed with the work, which by the
19 said supposed articles of agreement they had undertaken to perform; that the said charges were unjust and not in accordance with the said supposed articles of agreement, in consequence of which this defendant refused to pay the same to the said plaintiffs, and that thereupon, to wit, in the month of May, 1856, the said plaintiffs wholly abandoned their work upon defendant's road and utterly refused to proceed further with said work without just cause for such abandonment and refusal; and of this the defendant puts itself upon the country.

8. And for a further plea in this behalf the said defendant, by leave, &c., says that the said plaintiffs ought not to have or maintain their aforesaid action against this defendant, because this defendant says that he was always ready and willing to perform all of his said covenants in said supposed articles of agreement until the said plaintiffs wrongfully and without excuse abandoned their work, which they had promised in said supposed articles of agreement to perform, and that the said plaintiff, in the month of May, 1856, refused to proceed with the said work and turned over to this defendant all the maps, charts, notes, and instruments, the property of this defendant, which
20 were in the possession of said plaintiffs, and which were necessary to them in the performance of their covenants in said supposed articles of agreement contained, which the defendant is ready to verify; and of this the defendant puts itself upon the country.

Wherefore this defendant prays judgment if the said plaintiff ought to have or maintain their aforesaid action thereof against it, &c.

W. McL. McKAY & JAS. C. McRAE,
Att'ys for Defend't.

The defendant in the above-recited cause being a corporation, John M. Rose, a stockholder in said Western Railroad Company, as well as secretary of the company and by the bye-laws of the same, secretary of the board of directors appeared before me N. J. Riddick, clerk of the circuit court for the district of North Carolina, and maketh oath that the matters and things set forth in the foregoing plea as of his own knowledge are true, and those not of his own knowledge he believes to be true.

JNO. M. ROSE.

Sworn & subscribed before me Jan'y 15th, 1872.

N. J. RIDDICK, *Clerk.*

21 In the circuit court of the United States for the eastern district of North Carolina. November term, 1875.

S. SEYMOUR & CO.
vs.
THE WESTERN RAILROAD.

And for a further plea in this behalf the said defendant (by leave of the court allowing defendants to amend their answer at this term) says that the plaintiff ought not to have or maintain this action, because they say that the defendant, before the commencement of this suit paid to Silas Seymour & Co. large sums of money, in monthly payments, in full satisfaction and discharge of all the monies that was due to plaintiffs on account of all work and labor done by pl'ffs for defendants, and in full discharge of all damages sustained by plaintiffs by reason of any and all breaches of the covenant in pl't'ffs' declaration mentioned which said sums the said pl't'ffs accepted and received of and from the defendant in full satisfaction and discharge of any and all damages of said pl't'ffs, by him sustained by reason of the said breaches of covenant. And this defendant is ready to verify. Whereupon he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against them, &c.

W. McL. McKAY,
JAS. C. McRAE,
Attorneys.

22 And the said Silas Seymour, Silas M. Seymour, Alvin C. Morton, and L. L. Robinson, by their attorneys aforesaid, come and reply as follows:

23 UNITED STATES OF AMERICA,
District of Nor. Carolina:

In the circuit court of the U. S. for the 4th circuit & district of N. C.

S. SEYMOUR & CO.
v.
THE WESTERN R. R. COMPANY.

And the plaintiffs, as to the said plea of the said defendant first above pleaded, and whereof the said defendant hath put itself upon the count'y, do the like.

And the said plaintiffs as to the said plea of the said defendant thirdly above pleaded, and whereof the said defendant hath put itself upon the country, do the like.

And the said plaintiffs as to the said plea of the said defendant, fourthly above pleaded, say that the said plaintiffs, by reason of anything in that plea alleged, ought not to be barred from having and maintaining their aforesaid action against the said defendant because they say that they did well and truly perform and fulfil all and singular the promises and agreements in the said articles of agreement mentioned on their part and behalf to be done and performed, until they were prevented and wholly hindered from so doing by the wilful and wrongful acts of the defendant (as set forth in the declaration herein); and this they pray may be inquired of by the country.

24 And the said plaintiffs, as to the said plea of the said defendant fifthly above pleaded, whereof the said defendant hath put itself upon the country, do the like.

And the said plaintiffs as to the said plea of the said defendant, sixthly above pleaded, whereof the said defendant hath put itself upon the country, do the like.

And the said plaintiffs, as to the said plea of the said defendant, seventhly above pleaded, say that the said plaintiffs ought not to be barred from having and maintaining their aforesaid action against the said defendants, because they say that in the month of May, 1856, and at all times since the execution of the said articles of agreement in the said town of Fayetteville, and until they were prevented by the said defendant from completing the said work, that they were ready and willing and offered to well and truly perform and complete the whole of said work in pursuance of said articles of agreement, but that said defendants, on the 12th day of May, 1856, in the town of Fayetteville aforesaid, wrongfully and unjustly discharged said plaintiffs from the said work and from all connection with the same under the said articles of agreement. The plaintiffs further say that the certain charges of money made against the defendant by them, set out in the declaration 25 herein, and referred to in said plea were just, and were strictly in accordance with the letter and spirit of the said articles of agreement, for work done and materials furnished by them according to the same, and further that the failure and refusal of the defendant to pay said charges according to the said articles of agreement, materially interfered with the progress of the said work, and hindered and prevented the plaintiffs from completing the same. And this they pray may be inquired of by the country.

And the said plaintiffs as to the said plea of the said defendants, lastly above pleaded, and whereof the said defendant hath put itself upon the count'y, do the like.

BARNES & HINSDALE,
Pl't'ffs' Att'ys.

26 And thereafter, to wit, at November term, 1872 of the said circuit court, the death of Alvin C. Morton is suggested, and the pleadings are amended accordingly.

The cause is continued from term to term until November term, 1877, when it came on for trial before his honor Hugh L. Bond, circuit judge, presiding, and a jury, which is duly empanelled.

26½ *Verdict and judgment.*

Circuit court of the United States for the 4th circuit and eastern district of N. C.

SILAS SEYMOUR, SILAS M. SEYMOUR, AND Lester L. Robinson, surviving partners of S. Seymour & Co., plaintiffs,
against
THE WESTERN RAILROAD COMPANY, DEFENDANT.

The following jurors, to wit: M. V. B. Gilbert, O. R. Rand, Wm. R. Perkins, Wm. Cawthorn, Jno. Taylor, G. S. Patterson, col'd, J. Q. Adams, jr., W. M. Gaddy, John B. Bethea, J. A. Temple, Joseph Jones, and Wm. E. Fountain, being chosen, tried, and sworn to speak the truth of and concerning the issues joined by the parties, say that they find all issues in favor of the defendants.

Therefore it is considered that the defendant go thereof without day, and that the said defendant do recover against the plaintiffs and their sureties for the prosecution, his costs of suit.

27 At the said November term, 1877, the plaintiffs having excepted to the rulings and orders of the court at the trial of the said cause, now here excepts and files his bill of exceptions, and prays the court to allow, and sign, and seal the same, and that they may be made a part of the record; which is done at said term of the court.

28 Circuit court of the United States for the 4th circuit, eastern district of North Carolina.

SILAS SEYMOUR, SILAS M. SEYMOUR, AND LESTER L. Robinson, surviving partners of the firm of S. Seymour & Company, plaintiffs, *against* THE WESTERN RAILROAD COMPANY, DEFENDANTS. } Bill of exceptions.

Be it remembered, that on the trial of the issues joined between the parties at a court held for the fourth circuit and eastern district of North Carolina, at Metropolitan Hall, in the city of Raleigh, on the last Monday in November, A. D. 1877, before the honorable Hugh L. Bond, judge, the plaintiffs having proven the execution of the contract declared upon, a copy of which is hereto annexed and made a part hereof, offered it in evidence. Its admission was objected to by the defendants on the ground of variance. The objection was sustained by the judge and the evidence ruled out.

29 FIRST EXCEPTION.—The plaintiffs' counsel excepted.

That the plaintiffs produced and read the deposition of Edward N. Robinson, in which he deposed that the firm of S. Seymour and Company, at the date of the contract declared upon, was composed of Silas Seymour. Silas M. Seymour, Lester L. Robinson, and Alvin C. Morton, since deceased. That the said parties continued to compose the said firm named in said contract, until stoppage of work under said contract in May, 1856, and that they did a considerable amount of work under the said contract.

That the plaintiffs offered to prove by the deposition of Silas Seymour, that he made and executed the contract aforesaid with The Western Railroad Company, in behalf of and by authority of the firm of S. Seymour and Company, which was then composed of the parties abovenamed, and that they all did work under the contract, as the persons whom he associated with himself under the name of S. Seymour and Company, in performance of the contract; to all of which testimony the defendant's counsel objected as irrelevant.

30 The objection was sustained by the judge, the evidence ruled out, and—

2D EXCEPTION.—The plaintiffs' counsel excepted.

That the plaintiffs produced as a witness one Thomas S. Lutterloh, who was duly sworn, and offered to prove by him—

1st. That the firm of S. Seymour and Company, at and before the time of the execution of the contract declared upon, was composed of the plaintiffs and Alvin C. Morton, deceased;

2d. That these parties, including Alvin C. Morton, immediately commenced work upon the said railroad under the said contract, and were encouraged and induced by the said Western Railroad Company to proceed with the construction of the road as contractors, and that, relying upon and influenced by the said inducements and encouragements, they performed a large amount of labor upon the said road, the result of which the said Western Railroad Company have received and enjoyed ever since;

3d. That the said Western Railroad Company well knew that these parties composed the firm of S. Seymour and Company and were working upon defendant's road under said contract as contractors;

31 4th. That the said Silas Seymour subsequently to the execu-

tion of the said contract, and in pursuance thereof associated the said S. M. Seymour, L. L. Robinson, and A. C. Morton with himself, under the name of S. Seymour and Company, as contractors under the said contract, and made known the same to the defendants, and that the said firm immediately proceeded to work under the said contract, and to carry it into execution.

To all this, from 1st to 4th inclusive, the defendant's counsel objected as incompetent.

The objection was sustained by the judge, and the evidence ruled out—

3D EXCEPTION.—Whereon the plaintiffs' counsel excepted.

The plaintiffs having proven the execution of the contract declared upon, a copy of which is hereto annexed and made a part hereof, again offered it in evidence. Its admission was objected to by the defendant on the ground of variance.

The objection was sustained by the judge and the evidence ruled out.

4TH EXCEPTION.—The plaintiffs' counsel excepted.

Thereupon, the plaintiffs offering no further testimony, the judge directed the jury to find for the defendant.

5TH EXCEPTION.—To which plaintiffs excepted.

32 And inasmuch as the matters aforesaid do not appear by the record in this cause the counsel of the plaintiffs prayed that the judge would set his hand and seal to this bill of exceptions, and thereupon the said honorable Hugh L. Bond, judge, hath set his hand and seal thereto, according to the form of the statute in such case made and provided, at Raleigh, on the last Monday in November, A. D. 1877.

HUGH L. BOND, [SEAL.]
C'r' Judge.

(Endorsed:) Bill of exceptions. Filed December 12th, 1877. A. J. Riddick, clerk.

33 *Contract.*

Parties.

Articles of agreement made and concluded this twenty-seventh day of August, A. D. eighteen hundred and fifty-five, between the Western Railroad Company of the first part and Silas Seymour, and such other parties as he may associate with him, under the name of S. Seymour & Company, of the city of New York, of the second part, witnesseth:

That for and in consideration of the premises and the sum of one dollar in hand paid by each to the other, the receipt whereof is hereby acknowledged, the parties have agreed and bind themselves as follows:

Seymour & Co.

Location to be determined.

ARTICLE 1st. The said S. Seymour & Co., parties of the second part, hereby agree to construct entire a substantial railroad, with single track and turnouts, from some point at or near the Cape Fear River, in the town of Fayetteville, North Carolina, to a point in the coal region on the easterly side of Deep River, in the county of Chatham, the length of the said railroad not to exceed (43) forty-three miles, on the following terms and conditions: that is to say, the maximum grades ascending easterly are not to exceed fifty feet per mile, and ascending westerly the grades are not to exceed sixty feet per mile.

and practical engineer, and his decision shall be final and conclusive; the services of such engineer to be paid jointly by the parties of the 1st and 2nd part. It is also agreed that in case of the absence or inability of the superintending engineer, his principal assistant shall discharge all the duties required of such chief engineer until such absence or inability is removed.

Right of way.

ARTICLE 4TH. It is further agreed by and between the parties that the parties of the first part shall furnish all the necessary and proper right of way for the said railroad, and shall provide all the lands for all borrowing pits and spoil-banks that may be required, and all space & room for the manufacturing and deposit of all mechanical structures together with all roadways necessary for ingress and egress to and from said railroad works during its construction, free of all costs to the said S. Seymour & Co., parties hereto, whatever.

Commence work Oct. 1st.

Finish in two years.

ARTICLE 5TH. It is further agreed by and between the parties hereto, that the said work herein contemplated to be done shall be commenced by the parties of the second part on or before the first day of October, 1855 next, or within a reasonable time after being notified by the
40 president of said company that they are ready to go on with work and prepared to pay the monthly estimates as herein specified and provided for, and that the same shall be in all respects finished and completed as herein contemplated on or before the first day of October, one thousand eight hundred and fifty-seven.

$18,250 per mile.

How paid. $250,000 cash.

$300,000 first mortgage.

Balance.

2nd mortgage

ART. 6TH. It is further agreed by and between the parties hereto, that, for and in consideration of the faithful performance by the said S. Seymour & Co., parties of the second part, of all and singular the conditions herein contemplated or contained on their part proper for them to do, the said Western Railroad Company of the first part will well and truly pay or cause to be paid unto the said S. Seymour & Co., parties of the second part, eighteen thousand two hundred and fifty (18,250) dollars for each and every mile, and in the same ratio for any part of a mile of said railroad and side-tracks so constructed as is herein contemplated in manner as follows, that is to say, the sum of two hundred and fifty thousand (250,000) dollars in good current bank notes of the North Carolina banks; the sum of eighty-four thousand seven hundred (84,700) dollars in the capital stock of said railroad company at its par value; three hundred thousand (300,000) dollars in
41 the first mortgage bonds of the said railroad company at their par value, payable twenty years after date in the city of New York, bearing seven per cent. interest, payable semi-annually in the said city of New York; the said bonds to be convert*a*ble into the capital stock of the said railroad company at par value at any time after two years from the time of their date, and within one year of their maturity, and the balance of any payments that may be due the said second parties is to be paid in the second mortgage bonds of the said railroad company which shall be made to bear the same rate of interest, payable in

like manner and to be convert*a*ble the same as the aforesaid first mortgage bonds. They shall be payable in the city of New York, and shall run the same period.

It is further agreed by and between the parties hereto, that if the said second mortgage bonds are endorsed by the State of North Carolina, then and in that case the said second parties hereto, shall take the same in payment at their par value, but if the said second mortgage bonds are not so endorsed by the State aforesaid, then the said railroad company shall issue the same in such manner as shall make the value thereof in the result to the
42 said second parties equal to cash or otherwise made equal to their par value in the city of New York. It is further agreed by and between the parties hereto, that whenever the said second parties shall require, a trustee shall be appointed to hold and dispose of the said first and second mortgage bonds for the benefit of the parties hereto, then and in that case a trustee for this purpose shall be appointed by the mutual consent of the parties hereto who shall pay said bonds over or the proceeds of the sales of said bonds to the said second parties on the warrants of the treasurer of the said company after the same shall have been passed upon by the said board of directors of said company.

10 % to be reserved as indemnity.

Final settlement.

First-mortgage bonds, when to be issued.

ART. 7TH. The said company, parties of the first part, shall cause to be paid to the parties of the second part, on monthly estimates, such sums as may be due, reserving until the completion of the work ten per cent. in stock on said estimates, as security for the faithful performance of this contract on the part of the second parties, provided, however, that the ten p'r cent. so reserved shall not at any time exceed the gross amount of eighty-four thousand seven hundred (84,700) dollars, which said reservation and
43 all other sums due shall be well and truly paid to the said second parties within one month after the final completion of said railroad as herein contemplated. Seventy per cent. to be paid in cash on the monthly estimates as the work progresses (excepting for iron rails), provided the said seventy per cent. does not exceed the average sum of twenty thousand (20,000) dollars per month until the sum of two hundred and fifty thousand (250,000) dollars hereinbefore referred to as cash, and the amount of the second-mortgage bonds to be taken by the parties of the second part, which are to be made equal to cash to them, as heretofore specified shall be exhausted, and the balance due on such monthly estimates shall be paid in the aforesaid first-mortgage bonds; it is however understood and agreed between the parties hereto that none of the said first-mortgage bonds are to be issued to the parties of the second part on $^{a}/_{c}$ of such monthly estimates until the amount due them in said bonds shall reach the sum of twenty thousand (20,000) dollars, when said second parties shall be entitled to the full amount due on said bonds, and the same shall be issued to them.

It is further agreed between the parties hereto that the following schedule of prices shall be used by the chief

Schedule of prices.

44 engineer in making up the amounts of the monthly estimates for work done and material furnished, to wit:

Chopping and clearing p'r sq. rod	40c.	
Grubbing " " " "	150 "	
Earth excavations " " y'd	37 "	
Rock " "	100 "	
Timber & plank in trestle work, p'r thousand feet, b. m	25	dollars.
Timber & plank in culverts p'r thousand feet, b. m	25	"
Bridging for 100 f't span, linear foot	35	"
" " 50 " " " "	25	"
" " 30 " " " "	15	"
Cross-ties delivered, p'r tie	30 cts.	
Railroad spikes delivered, p'r pound	6 "	
Railroad iron delivered, p'r ton	$65	*doll's*
Track laying, p'r mile	$500	"
Timber delivered, p'r 1,000 feet, b. m	$12	"

It is further agreed that the following estimates of quantities shall be the maximum amount for each item of work contemplated in the stipulations hereinafter provided for in article eighth (8), to wit, including the amounts already done under a contract with Seymour, Risley & Co., viz:

45,000 sq'r. rods chopping and cleaning.
3,500 " " grubbing " "
975,000 c. yards earth excavations.
30,000 " " rock "
45 1,100,000 feet, b. m., timber & plank in trestle work.
750,000 " " " " " culverts.
100 lineal feet bridging, 100 feet span.
150 " " " 50 " "
180 " " " 30 " "
113,520 cross-ties.
208,000 lbs. spikes.
3,784 tons railroad iron.
43 miles tracking.

Extra work.

ARTICLE 8TH. It is further agreed by and between the parties hereto that the parties of the second part are to do all the work necessary in the said railroad, and are to be paid as extra work for anything not herein specified, the value of which shall be determined by the superintending engineer and the chief engineer, and any such amounts so determined are to be carried into the current monthly estimates; and it is further mutually agreed by the parties that the parties of the second part are not to be paid for any excess in the quantities of earth excavations, rock excavations, and timber and plank in trestle work and culverts, as set forth in the foregoing schedule, unless such excess shall be more than two and one-half p'r cent. of the whole amount specified for any one of the above items, then and in that case the parties of the first part shall 46 pay the parties of the second part for all such excesses at the same rate for each item, as provided in the foregoing schedule of prices, and in case the quantities of such work done shall not reach the amount set forth in said schedule by two and one-half per cent., then a corresponding reduction shall be made.

When track to be laid on first division.

ART. 9TH. It is further agreed by the parties hereto that whenever the first division of the said railroad, as now divided by the engineer, shall have been graded and the mechanical structures completed and ready for the track, the parties of the second part are to commence laying down the same, and that when the track shall have been laid a distance of five miles from the eastern terminus of the said railroad, the parties of the first part shall furnish an engine sufficient for the purpose, and the necessary platform cars, for the use of the parties of the second part for the transportation and distribution of iron and other materials required for the construction of the work, without charge to the said second parties; the said platform cars are to be furnished in time to be used in distributing the iron for the first five miles. It is further agreed between the parties that whenever the first division or more of the said railroad shall have been completed, the parties of
47 the first part may, after accepting and paying in full for the same, have the full use of said portion of the road for their own use and benefit, on condition that they shall transport the iron and other materials necessary for the work, which may be required by the parties of the second part, free of all charge and expense to the said second parties.

ARTICLE 10TH. It is further agreed between the parties hereto that the party of the first part shall, if required by the parties of the second part, advance to the party of the second part, on a/c of the purchase of railroad iron, such an amount as the chief engineer and superintending engineer may certify to be proportionally due upon the same, at the point where purchased or delivered, but said iron shall, when so advanced upon, be assigned to and considered as the property of the party of the first part until the same is delivered upon the road.

ART. 11TH. It is agreed that, in case the directors of the railroad company shall require a suspension of the construction of the road for the term of six months at the point where the line of said railroad touches the county line of the counties of Moore and Chatham, the parties of the second part agree so to suspend the operations without cost or damage to the parties of the second part.

48 In witness whereof the parties hereto have interchangeably set their hands, the said railroad company by its president, in Fayetteville, N. C., this the 27th day of August, 1855.

(Signed) C. B. MALLETT,
Pres't of the Western R. Road Co.
(Signed) S. SEYMOUR & CO.

This contract signed and the seal of the co. affixed by order of the b'd of directors.

{ SEAL OF CORPORATION. } (Signed) JNO. M. ROSE,
Sec'y for W. R. R. Co.

49 EASTERN DISTRICT OF NORTH CAROLINA, *ss:*

I, N. J. Riddick, clerk of the circuit court of the United States within and for the said eastern district of North Carolina, do hereby certify the above and foregoing to be a full, true, and perfect transcript of the record and proceedings had in the above-entitled cause, wherein Silas Seymour, Silas M. Seymour, and L. L. Robinson, surviving partners of S. Seymour & Company, are plaintiffs, and the Western Railroad Company is defendant, as appears from the record of said court remaining in my custody, excepting a number of depositions & orders for taking the same, and other interlocutory orders, which are omitted by direction of the attorneys for both the plaintiff' and defendant. I do further certify that the writ of error and citation issued herein by the plaintiffs in error, & copy of bond, are herewith appended to this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Raleigh, in the eastern district of North Carolina, this 11th day of October, 1879.

[SEAL.]

N. J. RIDDICK,
Clerk U. S. Circuit Court.

We consent that the orders & depositions may be omitted from the transcript.

GILLIAM & GATLING,
Att'ys for Def'd't.

This record is satisfactory.

J. W. HINSDALE,
Att'y for Plaintiffs.

50 UNITED STATES OF AMERICA, *ss.*

SILAS SEYMOUR, SILAS M. SEYMOUR & LESTER L. Robinson, surviving partners of S. Seymour & Company, plaintiffs,
versus
THE WESTERN RAILROAD COMPANY, DEFENDANT.

The President of the United States, to the judges of the circuit court of the United States for the fourth circuit and eastern district of North Carolina, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Silas Seymour, Silas M. Seymour, and Lester L. Robinson, surviving partners of S. Seymour & Company, plaintiffs, and the Western Railroad Company, defendant, a manifest error hath happened to the great damage of the said Silas Seymour, Silas M. Seymour, and Lester L. Robinson surviving partners of S. Seymour and
51 Company, plaintiffs, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal then, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on second Monday, October, 1879, in the said Supreme Court, to be then and there held, that, the record and proceedings afore-

said being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said
52 Supreme Court, the 16th day of October, in the year of our Lord one thousand eight hundred seventy-eight.

[SEAL.] N. J. RIDDICK, *Clerk*,
Clerk *of the U. S. Circuit Court for the 4th Circuit and Eastern District of North Carolina.*

Writ allowed. Oct. 16, 1878.

M. R. WAITE,
Chief Justice S. C., U. S.

(Indorsed:) No. 4. S. Seymour & Co. v. West. R. R. Co. Writ of error. Filed in office April 3rd, 1879. N. J. Riddick, clerk.

53 Circuit court of the United States for the eastern district of North Carolina.

SILAS SEYMOUR, SILAS M. SEYMOUR, & LESTER L. Robinson, surviving partners of S. Seymour & Company.
vs.
THE WESTERN RAILROAD COMPANY.

Know all men by these presents that we, John W. Hinsdale, Sam'l J. Hinsdale, and John Devereux, jr., are held and firmly bound unto the Western Railroad Company in the sum of five hundred dollars, to be paid to the said The Western Railroad Company and its successors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated September 11, 1878.

Whereas, Silas Seymour, Silas M. Seymour, and Lester L. Robinson, surviving partners of S. Seymour and Company, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled suit by the circuit court of the United States for the eastern district of North Carolina. Now therefore,
54 the condition of this obligation is such that if the above-named Silas Seymour, Silas M. Seymour, and Lester L. Robinson, surviving partners of S. Robinson and Company, shall prosecute their said writ of error with effect, and answer all*l* damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) JNO. W. HINSDALE. [SEAL.]
(Signed) S. J. HINSDALE. [SEAL.]
(Signed) JNO. DEVEREUX, JR. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. MCPHERSON, Jr., as to S. J. Hinsdale.

CUMBERLAND COUNTY:

On the 11th day of September, 1878, before me personally appeared Sam'l J. Hinsdale, to me known to be the person who executed the foregoing bond, and did personally acknowledge that he did execute the same; and the said Sam'l J. Hinsdale, being duly sworn, says that he is a resident and freeholder in Cumberland County, and worth double the amount of the foregoing bond, exclusive of property exempt from execution and over and above all liabilities.

55 Witness my hand and seal of office hereto affixed.

[SEAL OF OFFICE.] (Signed) A. McPHERSON, JR.,
Clerk of the Super'r Court.

SEPT. 13, 1878.

WAKE COUNTY:

On the 26th day of September, 1878, before me personally appeared Jno. W. Hinsdale and Jno. Devereux, jr., to me known to be the persons who executed the foregoing bond, and did severally personally acknowledge that he did execute the same; and the said Jno. W. Hinsdale and Jno. Deverue, jr., being duly sworn, say each for himself that he is a resident and freeholder in Wake County, N. C., and worth double the amount of the foregoing bond, exclusive of property exempt from execution and over and above all liabilities.

Witness my hand and seal of office hereto affixed.

[SEAL OF OFFICE.] (Signed) N. J. RIDDICK,
Clerk U. S. Circuit Court for the Eastern Dist. of N. C.

56 (Indorsed:) S. Seymour & Co. v. Western Railroad Co.
Bond.

Bond approved, but not to operate as a supersedeas. Oct. 16, '78.
(Signed) M. R. WAITE,
Chief Justice U. S.

Filed in office April 3rd, 1879. (Signed) N. J. Riddick, clerk.

EASTERN DISTRICT OF NORTH CAROLINA; *ss:*

I, N. J. Riddick, clerk of the circuit court of the United States within & for the eastern district of North Carolina, do hereby certify the above & foregoing copy of bond to be a full, true, and perfect transcript & copy of the bond filed in my office in the suit of S. Seymour & Co. vs. Western Railroad Company upon which writ of error was allowed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Raleigh, this 11th day of October, 1879.

N. J. RIDDICK, *Clerk.*

57 UNITED STATES OF AMERICA, *ss:*

To the Western Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of North Carolina, wherein Silas Seymour, Silas M. Seymour, and Lester L. Robinson, surviving partners of S. Seymour and Company, are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16th day of October, in

58 the year of our Lord one thousand eight hundred and seventy-eight.

M. R. WAITE,
Chief Justice U. S.

FAYETTEVILLE, N. C., *April* 3, 1879.

I this day serve a true copy of this citation on L. C. Jones, president of the Western Railroad Company, at his office in this place, at 10 o'clock a. m.

J. B. HILL,
U. S. Marshal,
Per D. G. MAC RAE,
Deputy Marshal.

D. G. Mac Rae comes before me, John X. Smith, United States commissioner for the eastern district of North Carolina, and maketh oath that the above return on the citation against the Western Railroad Company is true, and that a copy of the same was given to L. C. Jones, president of said company, as therein indicated.

JOHN X. SMITH, [SEAL.]
U. S. Commissioner for E. D. of N. C.

59 FAYETTEVILLE, N. C., *July 19th*, 1879.

I this day served a true copy of this citation on Julias A. Gray, the president of the Cape Fear and Yadkin Valley Railroad, which road is the successor of the Western Railroad.

J. B. HILL, *U. S. M.*,
Per D. G. MAC RAE,
Deputy.

Mc Rae. 2 summons, $4.00; mileage .

D. G. Mac Rae comes before me, Chas. McGary, notary public, and maketh oath that the above notice or the citation against the Western Railroad Company is true, and that a copy of the same was delivered to Julius A. Gray, president of the Cape Fear & Yadkin Valley Railroad, which is the successor of the Western Railroad Company, on the 19th July, 1879.

D. G. MAC RAE, *D. S.*

Sworn to & subscribed before me, a notary public, this thirtieth September, 1879.

[SEAL.] CHAS. McGARY, *N. P.*

(Indorsed:) S. Seymour & Co. vs. Western R. R. Co. Citation.

(Indorsement on cover:) No. 326. Silas Seymour, Silas M. Seymour, and Lester L. Robinson, surviving partners of S. Seymour & Company, plaintiffs in error, vs. The Western Railroad Company. E. North Carolina, C. C. U. S. Filed 13th October, 1879.

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OFFICE SUPREME COURT U.S.
FILED
APR 17 1882
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES.

No. 326.

SILAS SEYMOUR, SILAS M. SEYMOUR AND LESTER L. ROBINSON, SURVIVING PARTNERS OF S. SEYMOUR & COMPANY, PLAINTIFFS IN ERROR,

VS.

THE WESTERN RAILROAD COMPANY.

BRIEF FOR APPELLANTS. (Revised)

JOHN W. HINSDALE, *Counsel for Appellants.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

SILAS SEYMOUR, SILAS M. SEYMOUR and LESTER L. ROBINSON, surviving partners of the firm of S. SEYMOUR AND COMPANY, Plaintiffs in error,
Against
THE WESTERN RAIL ROAD COMPANY, Defendant.
} No. 326.

BRIEF OF JOHN W. HINSDALE, *Counsel for Appellants.*

STATEMENT OF THE CASE.

This was an action of covenant, instituted by Silas Seymour, Silas M. Seymour, Alvin C. Morton and Lester L. Robinson, co-partners trading under the name and style of S. Seymour and Company, Plaintiffs, against The Western Rail Road Company, Defendant, for a breach of the contract, a copy of which is made a part of the bill of exceptions, (page 11 of the record).

During the pendency of the action Alvin C. Morton died, and it was further prosecuted by the plaintiffs above named, as surviving partners. The contract was for the construction of a railroad between Fayetteville and Deep River, in North Carolina, and was signed by C. B. Mallett, President, and Jno. M. Rose, Secretary of the Western Rail Road Company, and by "S. Seymour & Co"—S. Seymour executing the same. The contract was sealed by the corporation only, and it purports on its face to have been made "between the Western Rail Road Company of the first part, and Silas Seymour, and such other parties as he may associate with him, under the name of S. Seymour & Co., of the second part;" and throughout the contract "S. Seymour and Company, parties of the second part," are named as contracting parties.

The plaintiffs declared upon the said contract, alleging, that under the same, they had entered upon the construction of the said railroad, and had performed a large amount of work and furnished a large quantity of material upon the same, for which they have not been paid, and that they were wrongfully discharged by the defendant from further performance and completion of their said agreement; and they laid their damages at $250,000.00. The defendant pleaded *non est factum*, together with other pleas. The plaintiffs filed a general replication.

The action was tried at November Term, 1877, of the Circuit Court of the United States for the Eastern District of North Carolina, before His Honor, Hugh L. Bond, Circuit Judge, and a jury.

The plaintiffs, having proved the execution of the said contract, offered it in evidence. Its admission was objected to by the defendant on the ground of variance; because the contract declared on was made with Silas Seymour, Silas M. Seymour, Alvin C. Morton and Lester L. Robinson, whereas, the contract offered in evidence, as contended by the defendant, purported to have been made with Silas Seymour alone.

The objection was sustained and the plaintiffs excepted.

The plaintiffs introduced evidence that, at the date of the contract declared upon, the firm of S. Seymour and Company was composed of Silas Seymour, Silas M. Seymour, Lester L. Robinson and Alvin C. Morton, and that the said parties continued to compose the said firm until stoppage of work under the contract in May, 1856, and that they did a considerable amount of work under the said contract; and they offered to prove by the deposition of Silas Seymour, that he made and executed the contract aforesaid with the Western Rail Road Company, in behalf of, and by authority of S. Seymour and Company, which was then composed of the parties above-named, and that they all did work under the contract, as the persons whom he had associated with himself under the name of S. Seymour and Company.

To all of this testimony the defendant's counsel objected, on the ground of irrelevancy. The objection was sustained, the evidence ruled out, and the plaintiffs' counsel excepted.

The plaintiffs offered to prove by one T. S. Lutterloh, a witness, who was duly sworn:

1st. That the firm of S. Seymour and Company, at and before the time of executing the contract declared upon, was composed of the plaintiffs and Alvin C. Morton, deceased.

2d. That these parties, including Alvin C. Morton, immediately commenced work upon said rail road under the said contract, and were encouraged and induced by the said Western Rail Road Company to proceed with the construction of the road as contractors; and that relying upon, and influenced by the said inducements and encouragements, they performed a large amount of labor upon the said road, the result of which the said Western Rail Road Company has received and enjoyed ever since.

3d. That the said Western Rail Road Company well knew that these parties composed the firm of S. Seymour and Company, and were working upon the defendant's road under said contract, as contractors.

4th. That the said Silas Seymour, subsequently to the execution of the said contract and in pursuance thereof, associated the said Silas M. Seymour, Lester L. Robinson and Alvin C. Morton with himself, under the name of S. Seymour and Company, as contractors, under the said contract, and made known the same to the defendants, and that the said firm immediately proceeded to work under the said contract, and to carry it into execution.

The defendant's counsel objected to all of this testimony as incompetent. The objection was sustained, and the evidence ruled out, whereon the plaintiffs' counsel excepted.

The plaintiffs having proven the execution of the contract aforesaid, again offered it in evidence. Its admission was again objected to by the defendant's counsel on the ground of variance. The objection was sustained and the evidence excluded. Plaintiffs' counsel excepted.

Thereupon, the plaintiffs offering no further testimony, His Honor directed the jury to find for the defendant, to which the plaintiffs excepted.

The jury found all issues in favor of the defendant, and judgment was thereupon rendered in favor of the defendant.

ASSIGNMENT OF ERROR.

The appellants assign the following errors:

First. The court below committed error, in excluding the contract, a copy of which is made a part of the bill of exceptions, on the ground of variance.

Second. The court below committed error, in excluding the deposition of Silas Seymour, by which the plaintiffs offered to prove, that he made and executed the contract aforesaid with the Western Rail Road Company, in behalf of, and by authority of S. Seymour and Company, which was then composed of the plaintiffs and Alvin C. Morton, since deceased, and that they all did work under the contract as the persons, whom he had associated with himself, under the name of S. Seymour and Company, in pursuance of the contract.

Third. The court below committed error, in excluding the testimony of Thomas S. Lutterloh, a witness for the plaintiffs, by whom they offered to prove:

1st. That the firm of S. Seymour and Company, at and before the time of the execution of the contract declared upon, was composed of the plaintiffs and Alvin C. Morton, since deceased.

2nd. That these parties, including Alvin C. Morton, immediately commenced work upon the said railroad under said contract, and were encouraged and induced by the said Western Rail Road Company to proceed with the construction of the road as contractors, and that, relying upon and influenced by the said inducements and encouragements, they performed a large amount of labor upon the said road, the result of which the said Western Rail Road Company has received and enjoyed ever since.

3rd. That the said Western Rail Road Company well knew, that these parties composed the firm of S. Seymour and Company, and were working upon defendant's road under said contract as contractors.

4th. That the said Silas Seymour, subsequently to the execution of the said contract, and in pursuance thereof, associated the said Silas M. Seymour, Lester L. Robinson and Alvin C. Morton with himself, under the name of S. Seymour and Company, as contractors under the said contract, and made known the same to the defendant: and that the said firm immediately proceeded to work under the said contract, and to carry it into execution.

Fourth. The court below committed error, in excluding, on the ground of variance, the evidence of the said contract, its execution having been proven, when the plaintiffs offered it the second time, after having proven, and offered to prove, the facts hereinbefore stated.

Fifth. The court below committed error, in directing the jury to find for the defendant.

BRIEF OF ARGUMENT.

FIRST. There was no variance between the contract declared upon and the one offered in evidence.

I. The contract must be read and construed as a whole. In the construction of covenants, technical rules are not to be so much consulted, as the real meaning of the parties, where it can be gathered from the instrument itself. The whole instrument must be taken together, and one part may be explained by another. *Killian* v. *Harshaw*, 7 Ired. Law, 497. Chitty on Contracts, 88. "*Ex antecedentibus et consequentibus fit optima interpretatio.*" The construction is to be such, that the whole instrument, and every part of it may take effect, if it be possible, consistently with the rules of law and the intention of the parties. Metcalf on Contracts, 287. That S. Seymour and Company were the contracting parties, is apparent on the face of the contract. Note the language of article first of the contract, page 11, of the record: "The said S. Seymour and Company, parties of the second part, hereby agree," &c. Also, of article second of the contract, page 12, of the record: "The contractors are to have the privilege," &c.; of article fourth, line 9, of the contract, page 14, of the record, "to the said S. Seymour and Company, parties hereto," &c.; of article sixth of the contract, page 14 of the record, "it is further agreed by and between the parties hereto that for and in consideration of the faithful performance of the said S. Seymour and Company, parties of the second part, of all and singular the conditions herein contemplated and contained, on their part, proper for them to do, the said Western Rail Road Company of the first part will well and truly pay, or cause to be paid, to the said S. Seymour and Company, parties of the second part," &c. Again, the words, "and said parties," occur in lines 26, 35, 40, 43 and 49, of article sixth of the contract, in lines 6, 11 and 28 of article seventh of the contract, on page 15 of the record, and in line 13 of article ninth of the contract, page 17 of the record. The words "parties of the second part" occur in lines 2, 9 and 25 of article seventh of the contract, and in lines 2, 9 and 16 of article eighth of the contract, and in lines 5, 19 and 22 of article ninth of the contract, and in line 3 of article tenth of the contract, on page 17 of the record.

The contract is executed in the name of S. Seymour and Company.

SECOND. It was competent for the plaintiffs to show, as they proposed, (see second exception, page 10, of the record,) that the firm of S. Seymour and Company, at the date of the contract declared upon, was composed of the plaintiffs and Alvin C. Morton, since deceased, and that they continued to compose the said firm until the stoppage of work under the contract, in May, 1856; and that they did a considerable amount of work under the contract; and that Silas Seymour made and executed the contract aforesaid with the Western Rail Road Company, in behalf and by authority of, the firm of S. Seymour and Company, which was then composed of the parties above named; and that they all did work under the contract, as the persons whom he associated with himself, under the name of S. Seymour and Company, in performance of the contract.

I. It matters not that the names of Silas Seymour's associates were not disclosed at the execution of the contract. They may still sue upon the contract as undisclosed principals, or as dormant partners. There is sufficient privity of contract to maintain an action, if the party actually making the contract with the defendant was acting for the plaintiff, and intended to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff. *Cooke* v. *Seeley*, 2 Exch. 746; 17 L. J. Exch. 286. The name in which a contract is made is *prima facie* evidence of the party, for whom the contract was made; but it is not conclusive, except by the custom of trade in the case of bills of exchange. *Cooke* v. *Seeley*. *Ib.*

As Silas Seymour had been expressly authorized by his co-partners to make this contract, and did make it in their behalf, it was their contract; they were bound by it, and *they could enforce it.*

If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is really an agent, contracting on behalf of an undisclosed principal, the latter may generally at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it. Addison on Contracts, 90. Metcalf on Contracts, 107. See also *Skinner* v. *Stocks*, 4 B. & Ald., 437; *Rodwell* v. *Redge*, 1 C. & P., 220; *Cothay* v. *Fennell*, 10 B. & C., 671; *Alexander* v. *Barker*, 2 Crompt. & J., 133; *Brassington* v. *Ault*, 2 Bing., 177; *Scrimshire* v. *Alderton*, Str., 1182; 1 Camp., 337; *Morris* v. *Cleasby*, 1 M. & S., 579; S. C., 4 M. & S., 566; *Bickerton* v. *Burrell*, 5 M. & S., 390, 391: *Hornby* v. *Lacy*, 6 M. & S., 166; *Beckham* v. *Drake*, 9 Mees. & Welsb., 78; *Drake* v. *Beckham*, 11 Mees. & Welsb, 315; *Patterson* v. *Gandassequi*, 15 East., 62; *Magee* v. *Atkinson*, 2 Mees. & Welsb, 440; *Truman* v. *Loder*, 11 Adol. & Ell., 589; *Garrett* v. *Handley*, 4 B. & C., 664; *Sadler* v. *Leigh*, 4 Camp., 195; *Coffin* v. *Walker*, 7 Taunt., 237. In *Small* v. *Atwood*, 1 Younge, 407, 452, Lord Lyndhurst said: "Where a contract is entered into by a person as agent for another, though it is not known that he is contracting in the character of agent at law, an action may be maintained, either in the name of the agent, or in the name of the principal." *Carr* v. *Hinchcliff*, 4 B. & C., 547; *Fish* v. *Kempton*, 7 C. B., 692; *Semenza* v. *Brinsley*, 18 C. B. N. S., 467; *Drasser* v. *Norwood*, 14 C. B. N. S., 574; 17 *Ib.*, 466; *Grogan* v. *Wade*, 2 Starkie, 443, (3 Eng. Com. Law, 423); *Humphrey* v. *Lucas*, 2 Car. & Kirw., 152, (61 E. C. L., 152); *Sargent* v. *Morris*, 3 B. & Ald., 277. Although, however, when the defendant has made his contract with one by name, another may have an interest in it, entitling him to sue jointly with the former, yet the defendant may make the same defence to the action brought by the two as if he had contracted with the former alone, and the action had been brought by him. *Robeson* v. *Drummond*, 2 Barn. & Adol., 303; 22 E. C. L., 83.

Where a contract is entered into by an agent in his own name, the principal may sue upon it, even though it is in part to be performed by the agent personally. *Phelps* v. *Prothero*, 16 C. B., 370; 1 Jur. N. S., 1170; 24 L. J. C. P., 225.

Although an agent enters into an agreement for the purchase of an estate in his own name, and appears to act on his own account, yet, on the vendor's default in completing the purchase, the principal may maintain an action for the deposit in his own name. *Duke of Norfolk* v. *Worthy*, 1 Camp., 337.

It appears from these cases to be the doctrine of the English Courts, that a dormant partner may be co plaintiff with the ostensible partner, in a suit upon a contract made by the latter upon partnership account. The ostensible partner is regarded as an agent contracting in his own name for an undisclosed principal, in which case, either the agent or principal may sue upon the contract.

In the United States the rule of the English Courts has been followed, and it has been generally held that the dormant partner may be joined. Parsons on Partnership, 291, note, and Story on Partnership (Gray's Edition), Sec. 241, 242 and cases cited; Gow on Partnership, 128, (3d Ed.); Collier on Partnership, 465; 1 Lindley on Partnership, 338; Story on Agency, 9th Edition, sec. 160, 160 a. 161, 418, 420 and cases cited; *Lapham* v. *Green*, 9 Vermont, 407; *Tharp* v. *Farquar*, 6 B. Monroe, 3; *Walter* v. *Ross*, 2 Wash., C. C. 283; Dunlap's Paley's Agency, 324 and note; *Leverick* v. *Meigs*, 1 Cowen, 646; *Hagan* v. *Short*, 24 Wend., 461; *Higdon* v. *Thomas*, 1 Harr. & Gill, 153; *Pitts* v. *Mower*, 18 Me., 361; *Edmond* v *Caldwell*, 15 Me., 340; *Huntington* v. *Knox*, 7 Cush., 371; *Girard* v *Taggart*, 5 Serg.

&. R., 19; *Golden* v. *Levy,* 1 Car. L. R., 528; *Titcomb* v· v. *Seaver*, 4 Greenl., 542; *Bank of United States* v. *Lyman*' 20 Vermont, 666, where Prentiss, J., says: "It seems now to be settled in England, whatever difference of opinion there may have formerly been in regard to it, that parol evidence is admissible to show that a person not named in a written simple agreement is the real party to it, either for the purpose of charging him upon it, or enabling him to take the benefit of it, as the case may be; but not, however, to *discharge* a party who has contracted in his own name. Thus, the real principal, or a partner from or to whom the consideration has moved, may sue or be sued upon a written simple agreement, though he do not appear upon its face to be a party to it. This was so decided in *Brickhouse* v. *Drake,* 9 Mees. & Welsb., 78, afterwards affirmed in the Exchequer Chamber in *Drake* v. *Beckham,* in Error, 11 Mees. &Welsb., 315. *Taintor* v. *Prendergast,* 3 Hill, N. Y., 72; *Edwards* v. *Golding,* 20 Vermont, 30; *Nicoll* v. *Burke,* 78 N. Y., 581; *Slawson* v. *Loring,* 5 Allen, 340; *Prather* v. *Ross,* 17 Ind., 495; *Kenyon* v. *Williams,* 19 Ind., 44; *Fuller* v. *Hooper,* 3 Gray, 334. In the case of *Browning* v. *Prov. Ins. Co. of Canada,* L. R., 5 P. C., 263, it was held, that where an insurance broker takes out a policy of insurance in his own name upon his principal's goods, the latter may sue upon the policy in his own name. *Prov. Ins. Co. of Canada* v. *Leduc.,* L. R,, 6 P. C., 224. Even though the agent is exclusively looked to in the contract, the undisclosed principal may sue. Wharton Agency, secs. 403, 722, 762; *Graham* v. *Duckwell,* 8 Bush., 12; *Woodruff* v. *McGehee,* 30 Geo., 158; *Foster* v. *Smith,* 3 Cold., Tenn.. 744; *Conkling* v. *Leeds,* 58 Ill.; 2 Kent's Com. (4th Ed.), 632; Bishop on Contracts, sec. 356. The principal can, if he chooses, maintain an action in his own name on a contract, which, he being unknown, his agent has made for him, in the agent's name—whether oral or in writing. Bishop on Contracts, secs. 356, 360 and cases cited.

Where a man contracts with a member of a firm about a partnership matter, but does not know of the partnership, and supposes himself to be giving credit merely to the individual—or deals with an ostensible firm while there is in fact a silent partner—he may, if he chooses, on discovering the facts, sue the firm in the one case, or the whole firm, including the silent partner in the other, upon the contract. In like manner, a suit on behalf of the firm, in such a case, against the man contracting, may be brought either in the name of the entire firm, or of the individual, or part of the firm, with whom the contract was in fact made. Bishop on Contract, secs. 394, 395; Metcalf on Contracts, 126, note c.

Silent partners may join in an action. 1 Hilliard on Contracts, 542. When an agent makes a contract without disclosing the name of his principal, the principal may claim all his rights, with the single limitation that the other party shall not be injured thereby. 1 Hilliard on Contracts, 598, citing *Woodruff* v. *McGehee*, 30 Geo., 158, and *Oelrichs* v. *Ford*, 21 Md., 499; 1 Parsons on Contracts, 62.

Some of the authorities hold that, in contracts by deed, no party can have a right of action under them, but the party whose name is subscribed to them; but this proposition must be qualified to restrict it to cases of deeds *inter partes*. It does not apply to cases of deeds-poll.

In the case of *Jung* v. *Phosphate of Lime Company*, a Spanish firm, C. & Co., authorized the plaintiff, a London merchant, by letter of attorney, to sign in the name of the firm a contract for the sale of their mines in Spain. The plaintiff was to be remunerated in part by the purchase money. Two documents were then made between the plaintiff, "acting for himself and under the letter of attorney, for and on behalf of C. & Co., co-proprietors with him of the mines of the one part," and the defendant of the other part, whereby the plaintiff, "acting for himself and his copartners, called the vendors," agreed to sell the mines, belonging to the vendors to the defendants, and they agreed to buy them. One part was sealed with the defendants' seal; the other signed by the plaintiff, "for self and partners." It was held that C. & Co. were parties and ought to be joined as plaintiffs in an action on this contract. 3 L. R., C. P., 139.

II. Even although Silas Seymour had no authority from his co-plaintiffs to make a contract for them, their ratification, which plaintiffs in effect offered to prove, was equivalent to a prior command and related back to the date of the contract. "*Omnis ratihabitio retrotrahitur et mandato priori equiparatur.*" Broom's Legal Maxims, 583, 584, 585, 777, 778, 780 and cases cited. *Bell* v. *Byerson*, 11 Iowa, 233; *Lawrence* v. *Fox*, 20 N. Y., 268. *Fleckner* v. *United States Bank*, 8 Wheat. 363; *Bell* v. *Cunningham*, 3 Peters, 81; *Bird* v. *Brown*, 14 Jur., 132. The title of an administrator relates back to the time of the death of the intestate, so as to entitle the personal representative to sue for the price of goods sold by one, who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate, the sale having been ratified by the plaintiff after he became administrator; for, when one means or professes to act as agent for another, a subsequent ratification by that other is equivalent to a prior command, and it is no objection, that the intended principal was unknown at the time to the person who intended to be the agent. *Foster* v. *Bates*, 12 M. & W., 225.

III. Whether the contract was made with S. Seymour, or with S. Seymour and Company, it is manifest that the covenants therein contained directly effected S. Seymour and Company, and were for their benefit. They were to do all the work and receive the compensation; and it is a significant fact that the contract was executed in their names. It is not necessary that the individuals composing the firm should be expressly named in the contract. *Murray* v. *Blackledge*, 71 N. C., 492; *Friedman* v. *Goodwin*, 1 McAll. 142; Addison on Contracts, 90.

It will be observed, that the contract is not a deed *inter partes*, but a deed-poll, being sealed by the defendant only. In case of deeds and other specialties *inter partes*, the action must in general be brought by and in the name of a party to the instrument, and a third person, a stranger to the deed, cannot sue thereon, though the covenant be expressly for his advantage. See *Lord Southampton* v. *Brown*, 6 B. & C., 718; Chitty on Contracts, 65 note a.

But the rule is different in the case of a deed-poll. For a stranger to it may sue on a covenant therein to pay him a sum of money. 1 Chitty Pl., 119; 2 Stephens Nisi Prius, 1058; Com. Dig. Covenant A. 1; *Cooler* v. *Childs*, 2 Lev., 74; *Gilby* v. *Copley*, 3 Lev., 138; *Lowther and wife* v. *Kelly*, 8 Mod. 116; *Gardner* v. *Lachlan*, 8 Sim., 123. So if by articles, A covenants generally to indemnify B, he may have covenant, though he did not seal the articles and the covenant was not with him. Com. Dig. Covenant A. 1.

The case of *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 Howard, 307, hereafter cited in this brief on the subject of estoppel, also decides that, although two persons are named in an indenture as "the party of the first part," if only one seals the deed, he alone is that party, and may sue alone on covenants with "the party of the first part." It was insisted in this case that Hiram Howard ought to havebeen joined as a co-plaintiff.

By reference to the indenture sued upon, it will be seen that it purports to be made between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehanna R. R. Co. of the second part. The covenants are not *by* or *with* these persons *nominatim*, but throughout, the party of the one part covenants with the party of the other part. Sebre Howard alone and the corporation sealed the deed. *It was a deed inter partes.*

"It is settled that if one of two covenantees does not execute the instrument, he must join in the action because their legal interest is joint, and if each was to sue, the court would not know for which to give judgment. And the rule has recently been carried so far as to hold, that where a joint covenantee has no beneficial interest, did not seal the deed and expressly disclaimed under seal, the other covenantee could not sue alone. But this rule has no application until it is ascertained that there is a joint covenantee, and this is to be determined in each case by examining the instrument. * * * * Our conclusion is that the action was rightly brought by Sebre Howard alone." *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Sebre Howard,* 13 Howard, 307.

This case is distinguished from the one under consideration, as in it, the instrument declared on, was a deed *inter partes,* while in the case at bar it is a deed-poll. It does not therefore conflict with the proposition that a stranger may sue on a covenant in a deed-poll for his benefit.

There are many cases of written contracts, as *policies of insurance* procured to be underwritten by agents or brokers in their own names, on which nevertheless the suit for the breach may be brought, either in the name of the principal or agents or brokers. See Story on Agency, secs. 160, 162; Story on Partnership, (Gray's Edition,) sec. 242.

An action as for a total loss was instituted upon a policy of insurance, in which the declaration set out the policy in the form of a deed-poll, sealed with the seal of a corporate company, in which it was recited, that K, one of the plaintiffs, had represented that he was interested in the subject matter, or duly authorized as owner, agent, or otherwise, to make the insurance; and that it was agreed that the capital stock and funds of the company, should according to the provisions of the deed of settlement of the company, be liable to make good, and applied to pay and make good all losses on the ship; it was provided that the capital stock and funds of the company should alone be liable, and that no shareholder of the company should be liable to any claims or demands, nor in any wise be charged by reason of the policy; the declaration averred that the company became insurers to the plaintiffs for a certain sum on the ship, and that the plaintiffs were always interested. It was held, that all the persons assured might well be joined as co-plaintiffs in an action on the policy with K, though they were not specially named in the deed-poll, for it is not absolutely necessary, in order that a person may be joined as a co-plaintiff in an action on a deed-poll, that he should be specifically named in the deed as a person interested in it, if he is so designated, that it cannot be mistaken that it was he who was interested. *Sunderland Marine Insurance Company* v. *Kearney*, 16 Q. B., 925; 16 Adol. & El, 725; 15 Jur., 1006.

In this case, looking to the frame of the policy to see to whom the company covenanted to pay, in case of a loss of the subject matter insured, the court acted upon the maxim "*certum est quod certum reddi potest*," and said, that a designation, which cannot be mistaken, is for this purpose as good as the actual name of the individual.

Even where a deed is made between parties, a person who is so described that he can be ascertained, may sue upon the covenants contained in it. 7 B. & S., 523.

It will be remarked, that a very considerable proportion of the English policies, for more than a century, have been by deed-poll, under the seal of the Royal Exchange Assurance Co., or of the London Assurance Co. "Upon such policies effected by brokers," Lord Campbell observes, in the case of *Sunderland, &c.*, v. *Kearney*, just cited, "many actions have been brought in the names of the parties interested, without any objection being made or thought of, respecting the right of the parties interested to sue." An instance of an action on a policy—brought not by the party named therein, but by another person alleging himself to be interested—is furnished in the case of *Southerland* v. *Pratt*, 11 M. & W., 310. The practice of such a person bringing such an action has probably prevailed since 1730, when the first decision was made in the case of *De Ghettoff, &c.* v. *The London Assurance Co.* The plantiffs filed a bill in equity alleging that their agent or trustee took the policy in his name and refuses to let the plaintiffs sue the assurance company in his name. A demurrer to this bill was allowed: the Chancellor (Lord King) saying that "at this rate all policies of insurance would be tried in this court, for they are generally taken in the name of a trustee." Mosely 83. There was another bill before the same Chancellor in 1729. The plaintiffs dealt in tobacco from Virginia to Scotland; the policy of insurance on tobacco was taken out in the name of one J.; there was a demurrer to the bill, and a like opinion upon it. *Fall, &c.* v. *Chambers, &c.*, Mosely 193. From the decision in the case of *De Ghettoff, &c.*, there was an appeal to the House of Lords, and there, in 1730, the order was affirmed. *De Ghettoff, &c.* v. *London Assurance Co.* 4 Brown's Par. Cas., p. 436 of Tomlin's Edition.

In Maryland, an action of covenant was sustained in 1810, in the name of T. G., upon a policy of insurance, which stated that H. & W. Y., for account of T. G., made insurance, &c. *Maryland Ins. Co.* v. *Graham*, 3 Har. & Johns., 62.

The contract, upon which the present action was brought, in one point of view, is very similar to the policy of insurance, as used in England, and described in the several cases cited. In England, the insurance may be effected, on the chance of its being adopted, for the benefit of those concerned, or to whom it might appertain; and when a policy is so made, a person interested may adopt the act. *Lucena* v. *Crawford, &c.*, 1 Taunt., 325; *Rowth* v. *Thompson*, 13 East., 285. By such adoption he becomes privy to it. See *Page* v. *Fry*, 2 Bos. & Pul., 240.

An action lies on a promise by the defendant, upon valid consideration, to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration. *Lawrence* v. *Fox*, 20 N. Y., 268; *Hall* v. *Marston*, 17

Mass., 575; *Brewer* v. *Dyer*, 7 Cush., 337; 1 Chitty on Pleading, 11.

A leading case is *Dutton* v. *Pool.* The plaintiffs, R. D. and G., his wife, declared that whereas Sir E. P., father of said G., was possessed and lawfully interested of and in certain timber trees growing on a certain park called Oaksey Park, in Wiltshire, intended to cut down and sell the same to raise portions for his children, of which intention the defendant having notice, he, said defendant, in consideration that Sir E. P., at defendant's special instance and request, would forbear cutting said trees, did promise Sir E. P. that he, said defendant, would pay to said G. £1,000. The plaintiffs averred that Sir E. P., after the making of the said promise, did not cut any of the said trees, and yet the defendant did not pay the said G. whilst she was sole, nor the said Sir R. and G., or either of them after their marriage, the said £1,000. Judgment for the plaintiff was given in the King's Bench, and affirmed in Exchequer Chamber. *Dutton* v. *Pool*, 2 Lev., 210; Sir Tho. Jones, 102; T. Raym, 392. See *Levet* v. *Hawes*, Cro. Eliz., 619; *Lagat's Case*, Latch 206; *Starkie* v. *Mill*, Style, 296; *Martyn* v. *Hynd*, Cowp., 443 by Ld. Mansfield. Butler, J., in *Marchington* v. *Vernon*, &c., 1 Bos. & Pul., 101, note a, says if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. *Pigott* v. *Thompson*, 3 Bos. & Pul., 149; *Felton* v. *Dickinson*, 10 Mass., 290; *Schermerhorn* v. *Vanderheyden*, 1 Johns, 139; *Brown* v. *O'Brien*, 1 Richardson, 270.

A party may sue on a promise, made for his benefit to a third person. *Cloud* v. *Moorman*, 18 Ind., 40; *Day* v. *Patterson*, Ibid. 114; *Beals* v. *Beals*, 20 Ind., 163.

It is true the contract authorizes the selection of associates by S. Seymour, and it may be contended that this was to be done *in futuro*, and that the parties treated throughout with reference to a future firm to be styled, "*S. Seymour & Co.;*" but the language is fairly susceptible of another construction, just as reasonable, and more consistent with the facts of the case. Instead of reading the premises of the contract, as if it were written "Articles of agreement made and concluded this twenty seventh day of August, A. D. eighteen hundred and fifty five, between the Western Rail Road Company of the first part, and Silas Seymour, and such other parties as he may, *in the future,* associate with him under the name of S. Seymour & Co., of the second part," let it be read—"Articles of agreement made and concluded this twenty-seventh day of August, A. D. eighteen hundred and fifty-five, between the Western Rail Road Company of the first part, and Silas Seymour and such other parties *as he may have associated, or as he may immediately associate with him,*" &c.

If the associates were not then selected, why was not the contract executed by and in the name of Silas Seymour alone? He was, by the contract, authorized to select associates. He had already selected them. He came instructed by them to make a contract for them. He again selected them when he signed the contract, "Seymour & Co," the name of the partnership. The power of selection vested in him by the defendant was executed *eo instanti.* No other partners were ever named. These were thus at once made parties to the contract by the direction of themselves and the defendant. The minds of all met, the contract was perfected, and took effect immediately. And under this belief, with this understanding, the plaintiffs, encouraged by the defendant, went to work in good faith under the contract; should not that construction be adopted, which upholds what was so fairly done—"*ut res magis valeat quam pereat?*"

IV. The contract was binding on all of the plaintiffs, because,

1st. It was made by their authority and in their behalf.

2d. Because they ratified and adopted it.

3d. Because it bound them by its very terms.

4th. Because S. Seymour had express authority to make them contractors with himself, and did so.

5th. Had they failed to perform, they would have been liable in an action by the Western Rail Road Company, although they had not signed the contract. *Nugent* v. *Riley*, 1 Metc., 117; *Newell* v. *Hill*, 2 Metc., 180; *Goodwin* v. *Gilbert*, 9 Mass., 510; *Brown* v. *Bostian*, 6 Jones Law (N. C.,) 1; 1 Chitty on Pleading, 115 But the obligation must have been reciprocal. Hence, the Western Rail Road Company is bound to the plaintiffs, and can be held upon the contract.

THIRD. It was competent for the plaintiffs to show, as they offered to do, by the witness T. S. Lutterloh, (see record, page 10,) that the plaintiffs and Morton immediately after the contract was entered into, commenced work upon the said rail road under said contract and were encouraged and induced by the said Western Rail Road Company to proceed with the construction of said road as contractors; and that relying upon and influenced by the said encouragements, they performed a large amount of labor on said road, the result of which the said Western Rail Road Company received and have enjoyed ever since; and that the said Western Rail Road Company well knew, that these parties composed the firm of S. Seymour and Company, and were working on defendant's road under said contract, as contractors.

The defendant was estopped, under these circumstances, from averring that it did not contract with the plaintiffs.

Where a person wilfully makes a representation, intended to induce another to act upon the faith of it, or where (whatever is his intention) a reasonable man in the situation of that other, would believe that it was meant that he should act upon it, and in either case, that other does act upon it as true, there is an estopped *in pais* to conclude the former from averring against the latter a different state of things as existing; and conduct by negligence or omission, where there is a duty cast upon the person to disclose the truth, may often have the same effect. *Freeman* v. *Cooke*, 6 D. & L., 187; 2 Exch., 654.

If A deliberately makes an assertion to B, intending it to be acted upon by B, and it is acted upon by B, A is estopped from saying that it was not true. *Piggott* v. *Stratton*, 1 DeG., F. & J., 33, 49; *Mason* v. *Williams*, 8 Jones Law (N. C.), 478; same case, 66 North Carolina Rep., 564; *Biggs* v. *Brickell*, 68 North Carolina Rep., 239; *Gill* v. *Denton*, 71 North Carolina Rep., 341; *East* v. *Doolhite*, 72 North Carolina Rep., 562.

Here the defendant in effect says to the plaintiffs: "I have authorized S. Seymour to associate you with himself as co-contractors under this contract; he has done so; I ratify his action, and recognize you as parties to this contract." Relying upon these declarations the plaintiffs do much work under the contract, which is received, and enjoyed by the defendant. When forced to sue for their compensation, they are cooly informed by the defendant that the defendant made no contract with them. "*Non est factum!*" But no man shall found a right upon his own wrong; and whatever a man has said or implied, wrongfully, for his own advantage, he shall be bound by, when it may turn to his disadvantage, however, false it may be in fact. *Jewett* v. *Miller*, 10 New York (6 Seld.) 402; 2 Parsons on Contract, 793, *et seq.*

If the principal accept, receive and hold the proceeds or beneficial results of a contract, he will be estopped from denying an original authority, or a ratification. *Botton* v. *Hillersden*, 1 Ld. Raym., 224, 225; *Thorold* v. *Smith*, 11 Mod., 72; *Smith* v. *Hodson*, 4 T. R., 211, 217.

An estopped *in pais* in general need not be pleaded to make it obligatory. *Gregg* v. *Wells*, 10 A. & E., 90; 2 Exch., 654; *Freeman* v. *Cooke*, 6 D. & L., 187; 2 Exch., 654; *Reg.* v. *Haughton*, 1 El. & Bl., 501; *Philadelphia, Wil-*

mington & Baltimore R. R. Co. v. Howard, 13 Howard, 307. Parsons on Contracts, 50, note *k*, also 476.

The plaintiffs, after holding themselves out as the associates of S. Seymour and contractors with him under the said contract, and after taking and claiming benefit under the contract, would not be permitted to deny that they were parties to the contract. Estoppels are mutual. The defendant is likewise estopped.

FOURTH. It was competent for the plaintiffs to show by the witness, T. S. Lutterloh, (see record, page 10,) that the said Silas Seymour subsequently to the execution of the said contract, and in pursuance thereof, associated with himself the said Silas M. Seymour, Lester L. Robinson and Alvin C. Morton, under the name of S. Seymour and Company, as contractors under the said contract, and made known the same to the defendants, and that the said firm immediately proceeded to work under the said contract and to carry it into execution.

The contract by its very terms authorized Silas Seymour to name his associates as contracting parties. He was expressly empowered under the seal of the Company to do so.

The plaintiffs proposed to show, that he executed this authority, which had been delegated to him, and advised the defendant of the same. The case would not have been stronger, if the defendant had left blanks for three names in the contract, and given to Silas Seymour power of attorney under seal to select the three parties and insert their names in the contract. The contract is not defective for uncertainty in the contracting parties, for Silas Seymour is appointed to name the persons. Though the co-partners or associates of Silas Seymour might not have been known when the contract was made, yet they were parties to the same, because the means of ascertaining them was provided in the agreement, and that means (the will of Silas), has been used so that the parties interested with him, as co-contractors, have become certain. "*Id certum est, quod certum reddi potest.*"

Albeit there appears no certainty of years in a lease, yet if by reference to a certainty it may be made certain, it sufficeth; and, therefore, if a man make a lease to another for so many years as J. S. shall name, this is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. Broom's Legal Maxims, 556.

Silas Seymour was the duly commissioned agent of the defendant to select the other contracting parties, and write their names in the contract. He was something more than a bare agent—he had a *right* to select such contracting parties as he might choose, a right acquired by contract between himself and the defendant. He had an authority coupled with an interest. Ch. Justice Wilde in the case of *Smart* v. *Sandars*, 5 C. B., 895, 917, says: "Where an agreement is entered into, on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority; such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest." 1 Parsons on Contracts, 72, note *d*. To determine whether the agency be irrevocable it is an important, if not a decisive question, whether the act authorized could be performed by the agent in his own name, or only by him as an agent and in the name of the principal. 1 Parsons on Contracts, 72.

The contract was *in fieri*, until the associates were designated and accepted its terms. Then the minds of all the contracting parties met, and the contract was complete. It is not necessary that the contract at the moment it was signed and sealed by the defendent should go into full operation. It may be regarded as an open bid by the defendant, which, when accepted by the other parties, became a binding contract. A deed to several grantees may take effect as to each one upon different days, for it may be delivered on different days to each grantee, and takes effect as to each from actual delivery. But as Silas Seymour had already selected his copartners, and did not seek to add to them by the selection of any others, as he could have done under his power, and as they had already accepted and ratified *this contract*, because they had previously committed themselves to S. Seymour in authorizing him to make it; the contract did take effect immediately.

FIFTH. It may be urged that Silas Seymour did not assume to contract for himself alone, but for others, who were to be selected by him in the future, and that the other parties not being present to contract for themselves, or even designated at that time, there was no meeting of minds—no contract. That to make a contract, there must be parties able to contract, willing to contract, and who do contract.

To this we reply:

1st. That having been previously authorized by his copartners, S. Seymour made a contract which they could adopt and enforce, as undiscovered principals or dormant partners. It was really their contract.

2d. That the contract on its face purports to be made with the firm, who also execute it.

3d. That there was a subsequent adoption and ratification by the firm which had relation back to the date of the contract.

4th. That by the terms of the contract, S. Seymour was authorized to select his associates under the contract, as contracting parties, which he did at once, and he was authorized *by them* to make this very contract. Here was certainly was an *aggregatio mentium.*

5th. The contract was like an escrow, not to take effect until the happening of some condition, namely, the selection by Seymour, and the acceptance by his associates.

6th. It does not lie in the mouth of the defendant to say, that the plaintiffs are not the parties with whom it contracted, after having expressly authorized Silas Seymour to make them parties to the contract, and having ratified said Seymour's action, and after having encouraged them to perform a large amount of labor on the road under the contract, as contractors, the result of which the defendant has received and enjoyed without compensation. The defendant is estopped from making so unconscientious a defence.

Sixth. There was no variance between the date of the contract declared on and the contract offered in evidence:

1. The dates agreed. The contract took effect on the day it bears date.

2. If the contract took effect after the date it bears, there was a relation back to such date.

3. Even if there was no such relation back, a difference between the day it bears date and the day it took effect is immaterial and not a ground of variance. Gould on Pl., 85; 1 Chit. on Pl., 308, note b., 311; Chitty on Bills, 7th Ed., 354. When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract, which took effect on a different day. If it be proved that a bond bearing date the first day of the month did not become obligatory until the fifteenth, this is no variance, although the bond is counted on in the pleading as a contract made on the first day of the month and bearing that date. *United States* v. *Le Baron*, 4 Wallace, 642.

4. The date of the contract is laid under a *videlicet*. "The plaintiffs, &c., complain for that whereas, heretofore, to wit, on the 27th day of August, 1855, &c." They are not held strictly to prove the date. Chitty on Pl., 311.

Seventh. In view of the foregoing, it is respectfully submitted, that the court below erred in instructing the jury to find in favor of the defendant.

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